THE HONOURABLE SRI JUSTICE
A.GOPAL REDDY

WP No.7741/2001

Dt.29-8-2007

K.Syamsunder

..Petitioner

Vs.

1. The Deputy Registrar of Co-operative Societies, Khammam, Khammam District and another.

..Respondents.

THE HONOURABLE SRI JUSTICE

A.GOPAL REDDY

WP No.7741/2001

Oral Order:

By invoking the mandamus jurisdiction of this court under Art. 226 of the Constitution of India, the petitioner calls in question the surcharge order under Sec. 60 of the A.P. Co-operative Societies Act, 1964 (for short "the Act") passed by the first respondent dt. 5-10-1991 as confirmed by the appellate tribunal-second respondent by its judgment dt. 5-2-2001 in CTA No.30/98 as arbitrary and illegal.

In fact surcharge order, as confirmed by the appellate tribunal constituted under the Act can be questioned only by invoking certiorari jurisdiction but not by Mandamus jurisdiction and certiorari jurisdiction can be exercised to correct gross errors by the inferior courts but not all orders, unless gross errors and infirmities pointed out in the orders passed or the Tribunal lacks jurisdiction.

The facts, which are not in dispute, and which give rise to filing of the present writ petition are briefly stated thus:

The petitioner was elected as President of the Primary Agricultural Co-operative Society, Tirumalayapalem, Khammam District on 30-10-1981 for a period of three years. During his tenure as President of the Society, he withdrew an amount of Rs.16,000/- towards Government share capital contribution through cheque No.7651 dt. 2-5-1983 from the District Co-operative Central Bank Limited, Tirumalayapalem Branch to run the essential commodities business as per the standing instructions. But the said cheque amount drawn by the petitioner has not been brought to the books of accounts of the society and misappropriated and before drawing the said amount the Society undertook cloth business. Based on the inspection report after conducting an enquiry under Sec.52 of the Act, a surcharge order in proceedings No.5349/83-E dt. 9-12-1987 was issued for recovery of Rs. 16000/-, the amount of which the petitioner alleged to have misappropriated. Questioning the same, the petitioner filed CMA No.1/88 before the Principal District Munsif, Khammam, who allowed the same on 11-9-1989 remanding the matter for fresh disposal with a direction to the first respondent to dispose of the matter according to the provisions of the Act and Rules and consider the documents filed by the petitioner and further ordering that till the fresh disposal by the first respondent, no amount can be collected from the

petitioner. In the light of the above direction and misappropriation case was detected under Sec.52 of the Act, a notice dt. 6-12-1990 was issued to the petitioner calling upon him to remit the Government share capital amount of Rs.16000/- drawn from DCC Bank, Tirumalayapalem Branch, which was misappropriated by him, together with interest at 18% per annum from 2-5-19983 or to appear before the first respondent, Deputy Registrar of Co-operative Societies, Khammam, on 20-12-1990 to show cause as to why the above amount should not be ordered for recovery by issuing surcharge order under Sec. 60 of the Act. The petitioner who attended the office of the first respondent submitted his representation dt. 20-12-1990 seeking 10 days time to file his written reply, which was considered favourably and the case was adjourned to 8-1-1991. On 8-1-1991 the same could not be taken for hearing as the first respondent was on camp and the case was adjourned to 29-1-1991. On 29-1-1991 the petitioner filed his written reply along with a copy of challan No.1226 dt. 2-5-1983 for Rs.14000/- issued by the DCC Bank Ltd., Tirumalayapalem Branch and subsequently he filed another statement on 25-2-1991 stating that Govt., share capital amount of Rs.16000/- drawn by him was paid to different textile shop owners at Vijayawada and the above transactions were not brought to the books of the accounts of the Society by the then Secretary of the Primary Agricultural Co-op. Society, Tirumalayapalem. On such representation being filed, the first respondent issued summons to the then Secretary of the said society to appear before him on 5-9-1991 along with records and other documents relating to the case. Accordingly, he attended the enquiry and submitted the records. After considering the entire records made available on record and the explanation offered by the petitioner, the first respondent passed surcharge order dt. 5-10-91 directing the petitioner to pay an amount of Rs.16000/- together with interest at 12% from 2-5-1983. While directing the petitioner to pay the said amount, the first respondent observed that the society has remitted an amount of Rs.14,000/- through Challan No.1226 dt. 2-5-1983 into DCC Bank Limited, Tirumalayapalem Branch and entered the same in cash book on 8-5-1983 at page 42 which shows that where there was a cash balance of Rs.15651-69 in the cash book as on 8-5-1983; the cheque amount drawn for Rs.16,000/- was not brought to the cash book of the society; in his explanation dt. 25-2-1991 he contended that he had undertaken cloth business prior to 2-5-1983 on credit basis to the extent of value of Rs.16,000/-; that cash book of the society maintained separately from 25-2-1983 to 6-4-1983 for the purpose of cloth business reveals that the society which had undertaken cloth business purchased cloth from various firms

under credit system but the amount of the sale proceeds or the stock of the cloth purchased was not brought to the main cash book/stock register and other books of the society; the petitioner simply made entries at receipts side and payments side simultaneously for the amount which he purchased cloth from the firms in the subsidiary cash book only; denial of the petitioner is blatant one and not supported by any evidence and the record itself proves that his statement is factually incorrect. He further observed that verification of the records would clearly go to show that amount withdrawn from DCC bank towards Government Share Capital has not been reflected in any of the records of the Society and when he purchased cloth at Rs.16000/- under the sundry creditors account he ought to have bring the stock at purchases side in the main cash book and other books of accounts of the society and the daily sale proceeds of cloth have to be brought to the cash book of the society, but either the cloth stock or the sale proceeds of Rs.16000/- has not been brought to the main cash book and other books of accounts of the society and when the amount of Rs.14000/- was paid through challan cash balance of Rs.15651-69 was available as on 8-5-1993, therefore, the amount of Rs.16000/- drawn by him has been misappropriated and accordingly issued surcharge order. Questioning the said surcharge order, the petitioner filed WP No.15678/1992. Pending writ petition, this court suspended the operation of surcharge order on condition of the petitioner depositing a sum of Rs.10000/- and it has been complied with by the petitioner. Thereafter, the writ petition was disposed of on 18-11-1997 directing the petitioner to file an appeal before the Co-operative Tribunal. Pursuant to the said order, the petitioner filed an appeal in CTA No.30/1998 before the Co-operative Tribunal at Hyderabad.

In the grounds of appeal appended to the Memorandum of Appeal, it is his contention that the first respondent failed to examine cash receipts of Rs.16000/- from 16-2-1982 to 2-5-1983 as mentioned in para 8 of the surcharge order, that the said payments were not genuine by examining the suppliers and whether they have received an amount of Rs.16000/- but issued orders simply on the ground that the cheque amount of Rs.16000/- has not been entered in the cash book. As per the first inspection report submitted by the Inspecting Officer, there was a stock deficit of Rs.12,188-35 as on 31-12-1983 and he fixed responsibility on the petitioner and the Secretary but the first respondent exonerated the paid Secretary and fixed the entire responsibility on the petitioner which is arbitrary. The impugned order was issued without examining the then Secretary, who along with the petitioner went to Vijayawada to make wholesale purchase and also took delivery of the stocks at

Khammam or Tirumalayapalem and it is his duty to maintain stock registers and other subsidiary registers and the impugned order is passed taking into consideration the payments made on 7-2-1984, 31-3-1984, 7-4-1984 and 26-5-1984 amounting to Rs.5000/-, which was certified by the Inspecting Officer and who arrived at Rs.7188-35 as recoverable from the petitioner and the Paid Secretary, therefore issuing surcharge order for Rs.16000/- basing on the drawal amount from the Bank is arbitrary and illegal. The observation of the Deputy Registrar made in his order at para 12 that the petitioner made entries at receipts side and payments side simultaneously for the amount for purchasing cloth from the firms were made in the subsidiary cash book only is incorrect and the first respondent has not properly taken into consideration the evidence adduced by the petitioner.

The appellate authority after considering the grounds of appeal, the records made available and the arguments advanced by the petitioner, gave a finding that entries in the cash book though were written by the Paid Secretary, the same was authenticated by the appellant with his signature, but non-credit transactions ie., purchase and sale of cloth have been entered by the Salesman and the appellant and not the Paid Secretary, therefore the responsibility for the transactions rests on the appellant and he cannot now shift the blame to the Paid Secretary who failed in his duties to enter the societies transactions in the relevant books of the society. The plea of the petitioner that he has drawn the Government share capital and has been advanced to wholesale cloth merchants at Vijayajada has not been accepted as no such payments are recorded either in the main cash book or in the non-credit cash book maintained by the petitioner. His plea that out of the Government share capital contribution drawn by him he has remitted Rs.14000/- on 2-5-1983 is fallacious as the amount remitted through challan was from out of cash balance of Rs.15,651-69 which was existing since 29-4-1983. Since he has taken contradictory stand in his statement that he has remitted the amount of Rs.16000/- to the wholesale cloth merchants at Vijayawada from Government Share Capital amount and at another point he stated that he remitted Rs.14000/- to the District Cooperative Central Bank Limited, Branch Tirumalayapalem from the amount of Government share capital, which he has drawn earlier, therefore neither of the statements have been considered by the Tribunal. The argument advanced before the Tribunal would go to show that the petitioner has advanced money to the society for carrying out the cloth business since 1983 and the society is due to him an amount of Rs.19,865/- and the same has to be adjusted

towards the Government share capital which he has drawn from the Bank, and if the same is adjusted he has to receive still an amount of Rs.865/- from the society, which stand has not been taken before the first respondent during surcharge proceedings. Further the verification of the entire ground balance of stock would show that the value of ground balance of the stock is Rs.19,022-72 even leaving a deficit of cloth worth Rs.12,188-35 as per the Inspection Report. If the petitioner advanced the amount to the society towards cloth business, none would prevent him to recoup the advanced money from the stock available in the society which comes to Rs.19,022/-, therefore the plea of the appellant that the society is due a sum of Rs.19865/- to him has not been accepted by the Tribunal and accordingly confirmed the surcharge order to an amount of Rs,.16000/-, drawn by him from the DCC Bank, Tirumalayapalem Bank towards Government share capital, which has not been debited to the books of the society.

Learned counsel for the petitioner contends that no opportunity was given to the petitioner after remand of the matter before he was surcharged, therefore passing of surcharge order amounts to violation of principles of natural justice. For the said proposition he placed reliance on a judgment of this court in CH.SANYASINAIDU V. DY. REGISTRAR OF CO-OPERATIVE SOCIETIES[1]. He further contends that in the absence of any loss to the society no surcharge order can be passed. Elaborating that order passed is in violation of principles of natural justice, he contends that when the Secretary of the Society was examined by the first respondent along with records, he was not given any opportunity to cross examine him separately nor permitted him to go through the records produced by the Secretary of the Society, which amounts to violation of principles of natural justice.

Per contra, learned Government Pleader contends that the petitioner never requested for cross-examination of the Secretary when he attended nor sought for permission to see to go through the documents produced by the then Secretary, therefore it was not open for him to contend first time that he was denied of opportunity. In the ground of appeal as referred to above, no complaint was made by the petitioner that Secretary was examined behind his back and he was not given any opportunity to cross-examine him when he produced the record. first time the said argument was advanced in the writ petition based upon the Division Bench judgment of this court as referred to supra.

Except stating in the writ petition that the first respondent has not

conducted a detailed enquiry which should as Civil Court enquiry under Sec. 60 of the Act by summoning the witnesses and records relating to the society and cash receipts produced by the petitioner, no specific plea has been taken with regard to his making any request for supply of documents produced by the Secretary nor seeking permission to cross examine the Secretary who produced the record.

It is well settled that (See:BHARAT SINGH V. STATE OF HARYANA [2] while in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it

In the absence of any foundation laid that principles of natural justice has not been followed by the first respondent before issuing surcharge order before the appellate authority, it is not open for the petitioner to contend first time that he was not given adequate opportunity to meet the allegations or inspection report which is the basis for issuance of surcharge order. The surcharge order clearly goes to show that on the date of hearing fixed, summons were issued to the Secretary of the Society for production of the records and accordingly he produced records on 5-9-1991. Further entire records and arguments advanced by the petitioner were considered by the first respondent and found that Rs.16000/- drawn by the petitioner from the DCC Bank, Tirumalayapalem Branch has not been reflected in any of the books of the accounts of the Society and the stand taken by the petitioner which was already referred that out of the amount drawn by him he deposited Rs.14000/- to the Bank and again taken a stand that he remitted the amount to the wholesale cloth merchants at Vijayawada, which itself is contradictory. Further the Tribunal found that cash balance of Rs.15651-69 was available on 29-4-1983 and out of the said amount he has paid Rs.14000/-. The argument advanced by the petitioner that society is due to him a sum of Rs.19,865/- as he advanced the same to the society towards cloth business has been fully considered by the Tribunal and rejected the same. The fact remained that the amount drawn by him Rs.16000/- from the DCC Central Bank Ltd., Branch Tirumalayapalem has not been reflected in any of the books of the accounts. It is for him to establish how the amount drawn by him was utilized for the benefit of the Society, and in the absence of the same, the surcharge orders passed by the first respondent as confirmed by the appellate authority do not suffer from any manifest illegality warranting interference by this court.

The writ petition is accordingly dismissed. No costs.

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A. GOPAL REDDY, J.

Dt.29-08-2007

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[1] 1998(1) ALT 482 (DB)

[2] AIR 1988 SC 2181 :: (1988) 4 SCC 534)